No. 82-1092

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONTINENTAL MANORS, INC., an Iowa Corporation,

Petitioner,

VS.

RICHARD S. SCHWEIKER, Secretary, United States Department of Health and Human Services; KATHLEEN A. LEAK, Principal Program Representative, Survey & Certification Operations Branch, Division of Health Standards & Quality, Health Care Financing Administration, Department of Health & Human Services, Region V, Chicago, Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the circuit court's decision, that due process requirements are satisfied by an opportunity to submit evidence contesting termination of a nursing facility's Medicare provider status to an official who can not act on it when the officer who can act terminates the status without seeing or considering the facility's submissions, conflict with the due process standard of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)?

2. Does a decision, that a colorable constitutional claim is essential to subject matter jurisdiction of a termination case, conflict with *Leedom* v. *Kyne*, 358 U.S. 184 (1958), holding that jurisdiction exists to strike down administrative actions directly contrary to express statutory procedural requirements and thus in excess of agency authority?

3. When a termination decision is made pursuant to an expressed agency policy of general application that contravenes the explicit procedural requirements of the governing statute (42 U.S.C. § 1395cc(f)), does the circuit court's holding that the termination decision was not "final" within the meaning of 42 U.S.C. § 405(g) conflict with *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), holding such decisions to be "final" because of the futility of administrative review of individual cases by officers who are bound by the unlawful policy?

4. Where the circuit court has disposed of a case for want of jurisdiction on the sole basis of the lack of a colorable constitutional claim without considering either (a) whether 42 U.S.C. § 405(g) confers jurisdiction without exhaustion of administrative remedies over a statutory claim that is collateral to a claim of entitlement, or (b) whether 28 U.S.C. § 1361 provides jurisdiction to strike down an agency action in excess of its delegated authority, should this Court decide those questions, or should it remand the case to the circuit court for consideration of them?

PARTIES TO THE PROCEEDING

The parties were as listed in the caption to this Petition. Continental Manors, Inc. is wholly-owned by C M Corporation, which has other wholly-owned subsidiaries. C M Corporation is privately owned. Kathleen Leak has left government employ. Her successor, Roy T. Gracey, has not been named a party.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i
PARTIES TO THE PROCEEDING IN THE CIRCUIT COURT iii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
OPINIONS BELOW 2
JURISDICTION IN THIS COURT 2
CONSTITUTION, STATUTES AND REGULATIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 6

I. THE CIRCUIT COURT'S DECISION CONFLICTS WITH THE PRINCIPLE ESTABLISHED BY THIS COURT IN *MATHEWS* v. *ELDRIDGE* 7

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE PRINCIPLES OF THIS COURT'S DECISION IN *LEEDOM* v. *KYNE*, WHICH HELD THAT DISTRICT COURTS HAVE JURISDICTION OF SUITS TO STRIKE DOWN ADMINSTRATIVE ACTIONS TAKEN IN EXCESS OF STATUTORY AUTHORITY 10

PAGE

III. THE CIRCUIT COURT'S DECISION CONFLICTS WITH THE PRINCIPLES OF *CALIFANO* v. *YAMASAKI* 12

A. Because Continental was terminated under a general procedural policy conflicting with the statute, the decision to terminate it was "final" 12

B. Statutory as well as constitutional claims are justiciable under 42 U.S.C. § 405(g) 13

IV. WHETHER MANDAMUS JURISDICTION EXISTS TO COMPEL DEPARTMENT OFFICERS TO ADHERE TO THE GOVERNING STATUTES AND REGULATIONS SHOULD BE DECIDED IN THIS CASE 14

CONCLUSION 16

APPENDIX A

Unpublished Order (slip opinion) — United States Court of Appeals for the Seventh Circuit A1

Unpublished Findings of Fact and Conclusions of Law United States District Court for the Northern District of Illinois A11

Preliminary Injunction—Same Court A39

Reconsidered Decision—Department of Health and Human Services A41

Opinion in *Americana Healthcare Corporation, et al.* v. *Schweiker* (etc.) 668 F. 2d 1062 (7th Cir. 1982) (Companion case) A47

Judgment—United States Court of Appeals for the Seventh Circuit, August 18, 1982 ..... A81

Order [denying petition for rehearing] — Same Court, October 5, 1982 ..... A83

APPENDIX B PAGE

AMENDMENT [V] to the Constitution of the United States B1

28 U.S.C. § 1361 ..... B1

42 U.S.C. § 405(g) B1

42 U.S.C. § 405(h) B3

42 U.S.C. § 13995cc(f) B3

42 C.F.R. § 405.1514 ..... B5

42 C.F.R. § 405.1515 ..... B5

TABLE OF AUTHORITIES

CASES PAGE

Americana Healthcare Corp., et al. v. *Schweiker*, 668 F. 2d 1062 (7th Cir. 1982) (A47ff) 2, 14, 15

Califano v. *Yamasaki*, 442 U.S. 682, 61 L.Ed. 2d 176, 99 S. Ct. 2545 (1979) 12-14

Leedom v. *Kyne*, 358 U.S. 184, 3 L. Ed. 2d 210, 79 S. Ct. 180 (1958) 10-11

Mathews v. *Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) 7-9, 14

Service v. *Dulles*, 354 U.S. 363 (1957) 11

Trinity Memorial Hospital of Cudahy, Inc. v. *Associated Hospital Services, Inc.*, 570 F. 2d 660 (7th Cir., 1977) 14

CASES PAGE

Weinberger v. *Salfi*, 422 U.S. 749, 45 L. Ed. 2d 522, 95 S. Ct. 2457 (1975) 15

CONSTITUTION, Amendment V 6, 7, 8

28 U.S.C. § 1361 .....3, 14, 15

42 U.S.C. § 405(g) 3, 6, 9, 11, 12, 13,14, 15

42 U.S.C. § 1395cc(f) 5, 11, 13

REGULATIONS

42 C.F.R. § 405.1515 11

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CONTINENTAL MANORS, INC., an Iowa Corporation,

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VS.

RICHARD S. SCHWEIKER, Secretary, United States Department of Health and Human Services; *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Continental Manors, Inc., respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered August 18, 1982.

OPINIONS BELOW

The unpublished opinion of the court of appeals appears in Appendix A at pages A1 to A10. The findings of fact and conclusions of law of the district court appear at pages A11 to A38 and its preliminary injunction appears at page A39 to A40. The reconsidered decision of the Department of Health and Human Services appears at A41 to A46. The published opinion of the court of appeals in the companion cases, *American Healthcare Corp. et al.* v. *Schweiker* [and consolidated cases], is reported at 668 F. 2d 1062 (7th Cir. 1982), and is reproduced starting at page A47.

JURISDICTION IN THIS COURT

The judgment of the court of appeals was entered on August 18, 1982. On August 26, 1982, it granted additional time for filing a petition for rehearing. The petition was then timely filed and was denied by the court of appeals on October 5, 1982. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED*

Constitution of the United States, Amendment V

28 U.S.C. § 1361

42 U.S.C. § 405(g), § 405(h), § 1395cc(f)

42 C.F.R. § 405.1514, § 405.1515

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* The texts appear in Appendix B.

STATEMENT OF THE CASE

The Court of Appeals for the Seventh Circuit reversed for lack of subject matter jurisdiction the district court's issuance of a preliminary injunction prohibiting the Secretary from terminating the provider status of Continental's skilled nursing facility in the Medicare program.[1] In seeking the injunction, Continental invoked jurisdiction under 28 U.S.C. § 1361 and 42 U.S.C. §405(g).[2] The controversy concerns the Secretary's termination procedures and whether they are designed and used to deny a meaningful opportunity to be heard before termination. It also concerns the power of the district court to compel adherence by government officials to the procedures prescribed by the statutes and regulations.

As reflected in the Findings of Fact in the district court, the Secretary's Program Representative notified Continental on September 24, 1981, that its provider status would be terminated as of October 31, (FF #15, A17). Continental had no prior notice of the deficiencies claimed to be the basis for that action,[3] (FF #16, A18). The notice invited Continental to seek reconsideration, and it did so, (FF #21, A19).

Continental's representatives conferred with the Program Representative and submitted to her many documents con-

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1. The unpublished opinion of the court of appeals appears in the Appendix at pages A1 to A10. The district court's Findings of Fact and Conclusions of Law, here referred to as FF #——— and CL ¶———, respectively, and the preliminary injunction appear in the Appendix at pages A11 to A40. The Findings were not challenged.

2. App. B, B1. Continental also claimed jurisdiction under other provisions of law no longer asserted.

3. Three minor deficiencies had been asserted earlier, (FF #11, A16).

testing her initial determination by pointing out inspectional errors, errors of interpretation of regulations, and corrections of deficiencies as they were made, (FF #23, A20). Although not agreeing with the Representative's retroactive application of construction codes that would require major work, Continental offered to comply for the sake of improving the facility and requested time to do so, but this was refused, (FF ##21, 22, 23, A19, A20, ##28, 29, A22, #35, A25). Mrs. Leak, the Program Representative, testified that she could not defer termination on the basis of anything Continental might submit, but only on the basis of further reports from federal inspectors indicating the facility to be in compliance with all of the conditions of participation,[4] (*Id.*, FF #25, A21, FF #40, A27).

The reconsideration was the Department's first decision made after it sent out its initial notice of termination and deficiency list. It was the first point at which the written submissions of Continental could be given any effect under the Department's procedures. It took place on November 9, 1981, nine days after the termination date established by the Program Representative. The official making the reconsidered determination was Mr. Philip Nathanson. He made his decision without ever looking at or considering any of the materials submitted by Continental, (FF #31, A23, CL ¶R, A36).

Mr. Nathanson's decision affirmed the termination of Continental's provider status, although asserting only one-

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4. Section 1861(j) of the Social Security Act, 42 U.S.C. § 1395x sets out conditions of participation to be met by nursing facilities wishing to serve Medicare patients. These deal with such matters as medical, nursing, dietary, housekeeping, physical conditions and safety and other aspects of the facilities.

third of the previously listed deficiencies (A41). The decision did not contain any finding that the remaining deficiencies immediately jeopardized Continental's patients (CL ¶T, A36).[5] It made the termination effective without allowing Continental any opportunity to contest or correct its deficiencies or to be heard beforehand.

After taking testimony, briefs and arguments from the parties, the district court found that the Department had denied Continental any meaningful opportunity to be heard in that the Program Representative would not give weight to nor act upon anything submitted by Continental, (FF #25, A21), and the officer reconsidering the initial decision never saw or considered any of Continental's submissions, (FF #31, A23, CL ¶R, A36). It held that the Secretary thus deprived Continental of its protected property rights without due process of law (CL ¶¶U, V, A37). The district court found that Mr. Nathanson had failed to follow the procedures required by 42 C.F.R. § 405.1515 by failing to consider any of Continental's written submissions (FF #31, A23, #37, A27). It held that he could not lawfully terminate Continental in a manner that contravened the regulation (CL ¶D, A29).

The district court also held that the termination violated 42 U.S.C. § 1395cc(f), which establishes the procedures for termination. The statute does not permit termination without an opportunity to correct deficiencies and a hearing, unless the Secretary determines that the deficiencies immediately jeopardize the patients (FF #36, A25, CL ¶¶E, F, G, A29 to A31). The district court found that the reconsidered determination purported to terminate Con-

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5. The Program Representative's original notice had contained such findings, although, as she testified, there was no emergency situation (FF #19, A18, #34, A25).

tinental's provider status without an immediate jeopardy finding and without allowing it an opportunity to correct deficiencies and a hearing before termination (FF #32, A24, #39, A27). It held that the reconsidered determination was, therefore, made in excess of the Secretary's statutory authority and was void on its face (CL ¶T, A36).

On appeal, the Seventh Circuit held that Continental's opportunity to confer with the Program Representative and to submit documentation to her satisfied due process, so that it had not presented a colorable constitutional claim (A6). It held that the district court had no jurisdiction under 42 U.S.C. § 405(g) until administrative remedies were exhausted (A7).

The court of appeals did not address Continental's claim that the district court had jurisdiction to determine whether the Secretary had acted in excess of his statutory authority and, if so, to order him to adhere to the procedures mandated by the statute and regulations. It did not advert to the findings and conclusions just mentioned. It did not address the issue of mandamus jurisdiction.

The court of appeals judgment was rendered August 18, 1982 (A81). Petition for rehearing was timely filed. It was denied October 5, 1982 (A83).

REASONS FOR GRANTING THE WRIT

This case involves the power of the federal judiciary to require a federal agency to follow the procedures required by the Due Process Clause of the Fifth Amendment to the United States Constitution, and the federal judiciary's power to compel a federal agency to follow the procedures explicitly imposed upon it by federal statutes and regulations. It arises in the context of the Social Security Act and the issues presented directly affect all providers under Titles XVIII and XIX of that Act.

I.

THE CIRCUIT COURT'S DECISION CONFLICTS WITH THE PRINCIPLE ESTABLISHED BY THIS COURT IN *MATHEWS* v. *ELDRIDGE.*

In conflict with the principle set forth in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976) the circuit court held that Petitioner had not presented a colorable constitutional claim. Mrs. Leak, the Secretary's program representative, was the sole witness offered by respondents. Her own testimony established that she was the person to whom Petitioner could present written submissions but she had no authority to act upon those submissions (*See,* FF #25, A21). After Petitioner was given notice of the alleged deficiencies and made written submissions in response to them, her testimony also established that the decision to terminate Petitioner's provider status was made by a person who never saw or considered any of those written submissions, (FF #31, A23); CL ¶R, A36).

In *Mathews* v. *Eldridge, supra,* at 333, this Court pointed out that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." It upheld a pre-termination procedure which included the opportunity to make written submissions rather than an evidentiary type hearing. But, it also makes it clear that a pre-termination opportunity to make written submissions does not in and of itself satisfy due process requirements. Affording an opportunity to make written submissions is sufficient if and only if use of such submissions and the other procedures coupled with them provide an effective opportunity to be heard prior to termination.

Petitioner does not contend that due process requires a pre-termination evidentiary type hearing. Instead, Petitioner asserts that due process requires that prior to termination becoming effective, it must have some effective way to present its case to the person authorized to decide whether termination is appropriate.

Unlike the procedures upheld in *Eldridge*, the Secretary's procedures for dealing with perceived deficiencies in nursing facilities do not afford an effective opportunity to respond to the deficiencies alleged prior to termination. The Secretary's first notice to the facility of the asserted deficiencies also contains the initial decision to terminate continued participation. Under the Department's procedures the person making that initial decision will accept written submissions from the facility but has no authority to change the decision or to defer its effect on the basis of anything the facility submits. The first person who will make a decision after the facility has an opportunity to make written submissions is either the person who will reconsider that decision or the administrative law judge. Under the Department's procedures, neither of those persons will make their decision until *after* termination has occurred. Thus, the use of written submissions fails to provide any oportunity for the facility to present its case until *after* termination has become effective.

This denial of a meaningful opportunity to be heard that is inherent in the Department's procedures was further exacerbated in the present case. After the effective date set by the Department for termination, a reconsidered decision was made. However, the person making that decision never looked at or considered any of Petitioner's written submissions.

The procedures involved in *Eldridge* stand in stark contrast to those involved in this case. In *Eldridge* a proposed determination was first sent stating the basis for the action. The recipient in *Eldridge* was then afforded an opportunity to respond. If he did so, the response would be considered in making the termination decision which would be made *before* any termination became effective, *Id.* 424 U.S. at 337-338.

The district court's Findings of Fact can "not be set aside unless clearly erroneous. . . ." Fed. R. Civ. P. 52(a). Respondents never claimed them to be clearly erroneous and the record fully supports them. Nevertheless, contrary to both the Findings of Fact and the record, the circuit court said that Petitioner was afforded more than an adequate opportunity to contest the Department's decision.

The district court's ruling that Petitioner was denied all opportunity to be heard at a meaningful time or in a meaningful manner is correct. With all due respect, it is the circuit court's statement that Petitioner was afforded an adequate opportunity to be heard that is erroneous. Indeed, under the Department's procedures, facilities will routinely be denied any meaningful opportunity to be heard.

For the above reasons, Petitioner presented a colorable constitutional claim under the principles this Court set forth in *Eldridge*. That claim is entirely collateral to a claim of entitlement because it challenges the procedures only and 42 U.S.C. § 405(g) confers federal district court jurisdiction to adjudicate it. *Eldridge*, 424 U.S. at 330-331.

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE PRINCIPLES OF THIS COURT'S DECISION IN *LEEDOM* v. *KYNE*, WHICH HELD THAT DISTRICT COURTS HAVE JURISDICTION OF SUITS TO STRIKE DOWN ADMINISTRATIVE ACTIONS TAKEN IN EXCESS OF STATUTORY AUTHORITY.

The Department cut off Continental's provider status by taking actions directly contrary to explicit procedural prerequisites of the governing statutes and regulations, thereby exceeding its delegated authority. Without once addressing that issue, the circuit court decided that it afforded no basis for federal court jurisdiction. It did so by holding that without a colorable *constitutional* claim there was no jurisdiction at all. (A10). The principle of this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184, 188-89 (1958), is directly to the contrary.

In *Leedom*, this Court held that the district courts have jurisdiction in suits to strike down administrative actions taken in excess of an agency's delegated powers and contrary to specific provisions of law. The Court pointed out that such suits are not the same as suits to "review" agency decisions made within agency authority and need not await "final" administrative action and the exhaustion of administrative remedies provided in the governing legislation. The unlawful action in *Leedom* was the NLRB certification of a bargaining unit without obtaining the consent of a class of members whose separate consent was expressly required by the Wagner Act. The question presented was whether the law, apart from the review provisions of the Act, afforded a remedy, and this Court held

that it did. It said that the federal district courts have jurisdiction of original suits to prevent deprivation of rights given by Congress through the agency's "attempted exercise of power that had been specifically withheld." 358 U.S. at 189.

Although the preclusive language of the Social Security Act, 42 U.S.C. § 405(g),(h), is not identical to that of the statute considered in *Leedom*, the principle that agency actions exceeding their statutory authority may be remedied in the district court is the same. The circuit court's decision in the present case conflicts with the *Leedom* principle by ignoring it.

In the instant case, the Department violated 42 C.F.R. § 405.1515[6] by making its "reconsidered determination" without examining the evidence submitted by Continental. It violated 42 U.S.C. § 1395cc(f) by terminating Continental's provider status without a correction opportunity even though it made no determination that the deficiencies still alleged at the time of reconsideration immediately jeopardized the patients. The district court recognized that its function was to determine whether the Department acted in contravention of the statute and regulations and thus in excess of its authority. (A12-A13). It held that the Department had done so. (FF #31, A23, #36, A25, #37, A26; CL ¶¶D-G, A29-A31, ¶¶R,T, A36, ¶W, A37). In enjoining the termination on the basis of the Department's actions to date (A40) the district court acted in accordance with the principle of *Leedom* v. *Kyne*. The circuit court's reversal was contrary to it.

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6. The procedural regulations of a department bind it with the force of law. *Service* v. *Dulles*, 354 U.S. 363, 387-89 (1957).

III.

THE CIRCUIT COURT'S DECISION CONFLICTS WITH THE PRINCIPLES OF *CALIFANO* v. *YAMASAKI*.

A.

Because Continental was terminated under a general procedural policy conflicting with the statute, the decision to terminate it was "final".

In *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), this Court examined challenges to the Department's establishment of a generally applicable procedure that contravened the Social Security Act by denying pre-recoupment hearings to persons requesting waivers of recoupment. It found jurisdiction in 42 U.S.C. § 405(g) to make this examination. Although the individual class members had not exhausted the administrative review procedures, the Department's established policy of denying oral hearings until after it started recouping the alleged overpayments would have made internal review futile. Accordingly, the lower-level decisions to recoup overpayments were, in effect, "final decisions" of the Department.

Here, the Secretary has established a policy of general application of terminating the provider status of nursing facilities that fail to meet a condition of participation without providing the statutory opportunity to correct deficiencies and to have a hearing beforehand, *whether or not there is immediate jeopardy to the patients.*[7] (CL¶G, A31).

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7. Mrs. Leak testified, "I cannot continue a facility in the program if even one condition of participation is not met." (Report of Proceedings, 315) If a facility's deficiencies *either* threaten patients *or* if conditions of participation are not met, "I still cannot continue them in participation." (*Id.*, 317)

As in *Yamasaki*, further review within the Department would be futile. So far as the Department is concerned, its decision as to Continental is "final". Because it expresses a policy of general application to thousands of facilities across the country, it will not be reversed at the behest of a single institution.

The finality requirement of 42 U.S.C. § 405(g) is thus met in the most practical sense, and the Department's decision was ripe for review by the district court. The circuit court's opinion that the Department's decision was not "final" conflicts with the principle of *Yamasaki*.

B.

Statutory as well as constitutional claims are justiciable under 42 U.S.C. § 405(g).

The circuit court also said that jurisdiction could exist only as to claims based on *constitutional* rights (A6, A10). *Yamasaki* pointed out that collateral *statutory* claims could be adjudicated by examining and interpreting the statute, and that it is inappropriate to make constitutional decisions where statutory ones will do. (442 U.S. at 692-93).

Continental's statutory claim had been sustained in the District Court, which held:

> T. The November 9th decision does not contain a determination of "immediate jeopardy", but merely reaffirms the decision to terminate without such a determination. Because the statute does not authorize termination in the absence of "immediate jeopardy" except *after* the facility has had a reasonable opportunity to correct its deficiencies [42 USC 1395cc(f)(2)], the "reconsidered determination" of November 9, 1981, was in excess of defendants' authority and void on its face.

(A36). (The original determination of immediate jeopardy could not transfer to the November 9th decision because of the clearance of two-thirds of the originally asserted deficiencies, leaving a different base upon which any new determination would have to be made.)

Misapprehending that § 405(g) jurisdiction was limited to constitutional claims, the circuit court never addressed Continental's statutory claim. The principles of *Yamasaki* require that it do so. While Continental's claim could be resolved by remanding this case to the circuit court for consideration of the statutory claim, the national importance of the Department's systematic misapplication of the statute is too great for its correction to be limited to the States included in a single circuit. It merits the attention of this Court.

IV.

WHETHER MANDAMUS JURISDICTION EXISTS TO COMPEL DEPARTMENT OFFICERS TO ADHERE TO THE GOVERNING STATUTES AND REGULATIONS SHOULD BE DECIDED IN THIS CASE.

This Court has reserved the question whether the Mandamus Act, 28 U.S.C. § 1361, is a grant of jurisdiction independent of the source of the duties owed. *Mathews* v. *Eldridge*, 424 U.S. 319, 332 n. 12 (1976); *Califano* v. *Yamasaki*, 442 U.S. 682, 689 (1979). The circuit court has also reserved it. *Trinity Memorial Hospital of Cudahy, Inc.* v. *Associated Hospital Service, Inc.*, 570 F. 2d 660. 666 (7th Cir., 1977); *Americana*, 668 F. 2d 1062 (7th Cir., 1982), Appendix hereto, A46 at A79.

The circuit court reserved the mandamus issue in *Americana* because the plaintiffs' claims rested on an interpretation of the statute with which the court disagreed. Continental's claims, however, rest upon a reading of the statute which is exactly the same as that of the circuit court: that the Department may terminate without opportunity to correct deficiencies and a hearing if, but only if, the deficiencies immediately jeopardize the patients of the terminated facility. Because the district court found and held that the Department not only violated the statute in Continental's case but had a fixed policy of violating it by terminating facilities without jeopardy findings (FF #17, A18), Continental squarely presented a mandamus claim.

Where jurisdiction was invoked on two grounds and this Court found one of them to be erroneous, it did not dismiss the case in *Weinberger* v. *Salfi*, 422 U.S. 749, 753 (1975). Rather, it examined the second ground asserted and found jurisdiction there. Having found jurisdiction under 42 U.S.C. § 405(g) as to some of the claims, it then decided them on the merits.

The circuit court did not follow this example. After holding that no jurisdiction existed under § 405(g) for want of a colorable constitutional claim, it reversed the district court for want of any subject matter jurisdiction. It failed to examine either Continental's claim of § 405(g) jurisdiction based upon the Department's exceeding its authority by violating the statute and the regulations pertaining to pretermination hearings, and also the claim of jurisdiction under 28 U.S.C. § 1361. Even if this Court does not grant a full review at this time, it should grant the writ and remand to the circuit court for the completion of its work according to this Court's example in *Salfi*.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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